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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1220

ARMOUR AND COMPANY, PETITIONER

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals appears at pages 441 to 459 of the Record. It has not yet been reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered March 29, 1945 (R. 460). The petition for a writ of certiorari was filed April 28, 1945. Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, as amended, c. 26, 56 Stat. 23 (herein sometimes referred to as "the Act"), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTIONS PRESENTED

(1) Whether petitioner established that the maximum prices for beef carcasses and wholesale cuts under Revised Maximum Price Regulation 169 are not "generally fair and equitable" within the meaning of Section 2 (a) of the Emergency Price Control Act or do not provide a "generally fair and equitable margin" for processing within the meaning of Section 3 of the Stabilization Act of 1942.

(2) Whether the statutory standards are satisfied, as applied to a multiple-product industry, if the industry's over-all earnings are in excess of those of a normal peacetime period, and if the industry obtains, with respect to the particular product or closely related group of products, the out-of-pocket costs involved in the production of the product or group of products, exclusive of selling and general administration expenses.

(3) Whether it was arbitrary and unreasonable or contrary to the provisions of Section 2 (a) and 2 (h) of the Act relating to accounting methods for the Price Administrator to refuse to accept the cut-out test method of determining beef costs as a measure of the adequacy of maximum prices for beef carcasses and wholesale cuts.

(4) Whether petitioner and other slaughterers of cattle who process beef and its by-products are unlawfully discriminated against by the fact that a special subsidy is paid to slaughterers of cattle who do not process beef and its by-products.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, of the Stabilization Act of October 2, 1942, as amended, (56 Stat. 765) and of Executive Order No. 9250, are set forth in the Appendix, *infra*. Revised Maximum Price Regulation No. 169, Beef and Veal Carcasses and Wholesale Cuts, was issued December 10, 1942, effective December 16, 1942 (7 F. R. 10381). The present proceeding involves the general level of maximum prices established by the Regulation for beef carcasses and wholesale cuts.

STATEMENT

Maximum legal prices for the sale of beef were first established by the General Maximum Price Regulation (7 F. R. 3153), issued April 28, 1942. Maximum Price Regulation No. 169, effective July 13, 1942 (7 F. R. 4653) removed beef and veal from the scope of the General Maximum Price Regulation and established maximum prices for them on the basis of each seller's selling prices during the last two weeks of March, 1942. The regulation was entirely revised and reissued on December 10, 1942, replacing individual ceilings on the basis of each seller's March, 1942 selling prices by dollars-and-cents prices uniform by zones throughout the United States.

Petitioner is engaged in the slaughter of all classes of livestock including cattle, the sale of fresh beef and other meats, and the processing and distribution

of numerous processed commodities using raw materials derived from livestock (R. 2, 122–123).

On February 8, 1943 petitioner filed its protest against the Regulation (R. 1), alleging that the Regulation required petitioner to sell beef and veal at a loss contrary to the provisions of the Act. On May 10, 1943 and August 19, 1943, petitioner filed additional evidence in support of the protest (R. 69, 79, 82, 93) pursuant to orders issued by the Administrator on March 12, 1943 (R. 65) and July 3, 1943 (R. 75). The Price Administrator, on August 24, 1943, introduced extensive evidence into the record of the protest proceeding (R. 229–230, 232–258). On October 27, 1943, the Price Administrator denied Petitioner's protest by an order and accompanying opinion (R. 281). Petitioner filed its complaint against the denial in the Emergency Court of Appeals on November 26, 1943 (R. 165). On December 30, 1943, petitioner applied to the court for leave to introduce additional evidence (R. 206). The application was granted (R. 212) and on March 31, 1944, petitioner filed its additional evidence with the Price Administrator (R. 113–125). On June 21, 1944, the Administrator issued an order and opinion denying petitioner's protest upon reconsideration (R. 127–163). An amended complaint was filed in the Emergency Court of Appeals on March 1, 1944 (R. 179), pursuant to leave granted by order of the court (R. 213).

The Price Administrator's answer, and the transcript of proceedings before him, were filed on July 21, 1944. The Emergency Court of Appeals sus-

tained the denial of the protest and dismissed the complaint (R. 441–460).

ARGUMENT

1. Petitioner's primary attack on the decision of the Emergency Court of Appeals is that the Emergency Price Control Act does not authorize the establishment or maintenance of maximum prices which return less than total costs for every product or group of products produced by a multiple-product industry, the over-all earnings of which are in excess of those of representative peacetime years. The impression created by petitioner's brief is that a construction of the Act authorizing such maximum prices was manufactured out of whole cloth by the Administrator or the court below for the purposes of this case. The fact is, however, that this challenged construction of the Act has been settled beyond question by the course of legislative history, had been consistently applied by the Administrator, and had been accepted by the court below in previous cases.

Authority to establish maximum prices is conferred upon the Price Administrator by Section 2 (a) of the Act. The same clause prescribes the standard which governs his exercise of the authority granted: the maximum prices established must be such "as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act." Congressional understanding of the meaning of this basic standard is to be found in the Report of the Senate Committee accompanying the bill which became the Emergency Price Control Act of 1942. Comment-

ing on section 2 (a) of the bill, which became Section 2 (a) of the Act, the report stated:

> Because of the legislative nature of regulations establishing maximum prices, applying to large numbers of sellers, the bill does not guarantee a profit to each individual seller. It requires instead that such prices be generally fair and equitable as applied to the sellers responsible for the major part of the output of the commodity. As to such sellers it is the effect of the maximum price upon their over-all operations as business units that must be considered. (Sen. Rep. 931, 77th Cong., 2d Sess., p. 15.)

This statement, having been before every Senator during the course of the debates upon, and during the passage of, the Act, must be accorded dominant weight in determining the intention of Congress. It indicates clearly the salient importance of earnings from over-all operations in the basic statutory standard.

If any doubt remained as to the meaning of this standard, it was removed unqualifiedly by subsequent legislative history. By its terms as enacted, the Emergency Price Control Act was to terminate on June 30, 1943 (56 Stat. 24, Sec. 1 (b)). Section 7 (a) of the Stabilization Act of October 2, 1942 (56 Stat. 767) amended section 1 (b) of the Emergency Price Control Act by extending the termination date to June 30, 1944. In the spring of 1944, bills were introduced in the House (H. R. 4376, 78th Cong., 2d Sess.) and in the Senate (S. 1764, 78th Cong., 2d Sess.) to pro-

vide for the renewal of the Act for another year. During the course of protracted hearings before the Banking and Currency Committees of both Houses of Congress, the administration of the Act by the Price Administrator was exhaustively reviewed. In the course of that review, the Administrator and members of his staff explained fully the standards which had been and were being applied to determine when price increases should be granted.[1] These were concisely summarized in a supplement to the Report of the Senate Committee in the following terms:

> Of the increases authorized by the Price Administrator on the ground that they are required by mandatory provisions of the Emergency Price Control Act or the Stabilization Act, by far the most important, numerically, are those increases which are necessary if the ceilings in question are to continue to be generally fair and equitable. The so-called industry earnings standard is used for determining whether or not increases should be

[1] Oral statements by Mr. Brownlee, Deputy Administrator for Price: House Hearings on H. R. 4376, 78th Cong., 2d Sess. (1944) (hereafter referred to as House Hearings), Vol. 1, pp. 55, 62; Senate Hearings on S. 1764, 78th Cong., 2d Sess. (1944) (hereafter referred to as Senate Hearings), pp. 77–78, 91–96; written statements by the Administrator: Senate Hearings, pp. 1444–1445, House Hearings, Vol. 2, pp. 2128–2130; Memorandum on Certain Questions of Construction of the Emergency Price Control Act of 1942 relating to Standards for Maximum Prices, Senate Hearings, pp. 1404–1412, House Hearings, Vol. 2, pp. 1984–1993; Memorandum on Certain Questions of Construction of the Emergency Price Control Act of 1942 and the Stabilization Act of October 2, 1942, House Hearings, Vol. 2, pp. 1993, 1996–1999; Senate Hearings, pp. 1422, 1425–1428.

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permitted for this purpose. Under this standard, as a general rule, price increases are allowed to compensate for those cost increases which the industry cannot absorb without impairment of its normal peacetime earnings. As a guide for determining the extent to which price increases are required under this standard, the Administrator uses a representative peacetime period, usually the years 1936–39, the base period adopted by Congress for excess-profits taxes. Where this period is not fairly representative, the years included in the period are varied or other appropriate adjustments are made. If, during or subsequent to the year ended October 1, 1941, costs have increased more than gross income, then, to the extent that the industry's earnings, adjusted for changes in investment, provide a smaller return before Federal income and excess-profits taxes than the industry earned in the base period, the Administrator considers an increase in the industry's maximum prices to be required by law.

Even though a price increase is not required under the industry earnings standard, an increase may be required under the so-called products standard which is used as a secondary pricing guide in the case of multiple-product industries. Under this standard, unless it had been the industry's practice to sell some of its products below cost, the Administrator considers himself required to increase the maximum price for any particular product sold by the industry, if its current maximum price should fail to cover the out-of-pocket costs incurred by the highest-cost firms which

> are not included in the industry's high-cost marginal fringe. Ordinarily an industry will be considered as a single-product industry even though the bulk of the product is produced by multiple-product firms if a substantial portion of the output is produced by single-product firms. (Sen. Rep. No. 922, 78th Cong., 2d Sess., pp. 45–47.)

To put it briefly, the Administrator repeatedly told Congress in the clearest terms that if an industry which produced many products was earning, in its over-all operations, more than it had earned in representative peacetime years, he did not believe that the Act required him to increase the prices for individual products of that industry so long as the prices covered the out-of-pocket costs incurred by the industry in the production of those products. The Administrator and his subordinates also told Congress why any other standard would be both contrary to the normal practices of industry and destructive of stabilization.[2] Congress then extended the effective date of the Act, without making any change in the basic standards.[3] The conclusion is inescapable that the Administrator's interpretation of what constitutes "generally fair and equitable prices" under the Act has met with Congressional acceptance and approval. *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 313; *Costanzo* v. *Tillinghast*, 287 U. S. 341, 345. The Emergency Court

[2] Senate Hearings, *supra*, pp. 95–96.

[3] Stabilization Extension Act of June 30, 1944, c. 325, 58 Stat. 643.

of Appeals had so held in *Gillespie-Rogers-Pyatt Co., et al.* v. *Bowles*, 144 F. (2d) 361 (1944). That holding was clearly right. Cf. *Safeway Stores Inc.* v. *Bowles*, 145 F. (2d) 836, cert. den. February 26, 1945, Nos. 798–799, this Term.

Contrary to petitioner's unsupported assumption, it is clear that the product standard formulated in terms of "out-of-pocket" costs did not refer to total costs.[4] In the *Gillespie* case, the Emergency Court of Appeals stated (144 F. (2d) at 366):

> We think that Congress fully understood and approved the use by the Administrator of the industry earnings and product pricing standards when it extended the Emergency Price Control Act by the enactment of the Stabilization Extension Act of 1944.

The industry involved in that case was a multiple product industry. The complaint was dismissed because the complainants had failed to show that the industry's over-all earnings were below those of a representative peacetime period, and because the figures actually submitted

> do not show, even for the most recent period, an out-of-pocket manufacturing loss which under the application of the product standard would call for a price increase regardless of the over-all earnings of the industry. (144 F. (2d) at 368.).

This is, of course, consistent with the general use of

[4] See, for example, the views of the minority of the Senate Committee on Banking and Currency, S. Rep. No. 922, 78th Cong. 2d Sess., p. 25; remarks of Senator Taft during debate, 90 Cong. Rec. pp. 5603–5605, June 9, 1944.

the phrase apart from its use in connection with the Act.[5]

In the light of these facts, petitioner's entire argument assumes a vitally different aspect. Since it is manifest that the basic standard of the Act does not require more than the return of out-of-pocket costs on products of a multiple-product industry whose over-all earnings are at least equal to those of peacetime years, the only remaining questions presented by the petition are the application of the standard to the meat industry in the light of other provisions of the Act, and the alleged unconstitutional discrimination attendant upon the payment of a special subsidy to a special class within the industry, the non-processing slaughterers.

[5] See *Mississippi Railroad Commission* v. *Mobile & O. R. Co.*, 244 U. S. 388, 395; *Helvering* v. *Northern Pacific Railway Co.*, 105 F. (2d) 730, 731 (C. C. A. 8, 1939); *The Glendola* (*Standard Oil Co. of N. J.* v. *Glendola S. S. Corp.*), 47 F. (2d) 206, 209 (C. C. A. 2, 1931). The Price Administrator did not formulate a precise definition of the phrase "out-of-pocket costs" during the hearings on the Stabilization Extension Act. Recently, at the hearings before the Senate Banking and Currency Committee on S. J. Res. 30, 79th Cong. 1st Sess., a joint resolution extending the effective period of the Act, Mr. James F. Brownlee, the Deputy Administrator for Price, stated (p. 109):

"Again, we do not believe that, as a working administrative rule, we should try in each case to make an exact determination of what costs are "out-of-pocket costs." Out-of-pocket costs are those which would be eliminated if manufacture of the product were to be discontinued. While these are the costs which in principle should be covered, we have found that it is often a matter of serious accounting difficulty to compute them—as, for example, to find out just what part of factory overhead is included in out-of-

2. The first of these questions is whether a different standard is applicable to products processed from agricultural commodities because of the so-called McKellar Amendment to section 3 of the Stabilization Act of 1942. Section 3 of that Act sets minimum limits on the maximum prices which may be established for agricultural commodities and commodities processed therefrom. It modified the provisions of section 3 of the Emergency Price Control Act. The McKellar Amendment is a proviso to section 3 and reads as follows (*infra*, p. 38):

> *Provided further*, That in the fixing of maximum prices on products resulting from the processing of agricultural commodities, including livestock, a generally fair and equitable margin shall be allowed for such processing:

In the first place, as the Court below observed, "generally fair and equitable prices", the words of section 2 (a), "would naturally mean that the prices established must allow a generally fair and equitable

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pocket costs. We have come to the conclusion, therefore, that as a working rule we ought ordinarily to use the higher measure of manufacturing costs, although deductions from these costs, or additions to them, will be appropriate in some cases. By then using an average of these manufacturing costs, with or without such adjustment, we are able to cover the out-of-pocket costs for the bulk of the output."

In the present case, it is undisputed that the maximum prices have covered total manufacturing costs on cattle operations as a whole. It therefore was unnecessary for the Administrator or the court below to determine whether anything more than general administration and selling expenses could properly be deducted from total costs in determining out-of-pocket costs.

margin" (R. 458). In other words, the natural meaning of the language of section 2 (a) and of the McKellar Amendment is the same. Moreover, the grammatical form of the McKellar Amendment is incompatible with petitioner's position. The proviso does not require that there should be an equitable margin for each product resulting from the processing of livestock and other agricultural commodities. On the contrary, it requires only that there be a "generally fair and equitable margin" for "such processing," that is, the processing of agricultural commodities including livestock. These considerations, involving the language of the statute alone, should settle the question.

If any doubt existed, it would be resolved by the legislative history of the adoption of the McKellar Amendment. When the amendment was offered on the floor of the Senate, Senator Brown, who was in charge of the bill said (88 Cong. Rec. 7243):

> Mr. President, that Amendment is in line with the policy already established by the Price Control Act, and I believe it is substantially a restatement of existing law. As I understand, the Senator from Tennessee desires that the policy be restated in the joint resolution. Personally I have no objection.

In the face of this powerful evidence as to the identity between the standards of section 2 (a) of the Act and the McKellar Amendment, petitioner can only urge the unsupported hypothesis that Congress, in passing the McKellar Amendment, must

have been trying to correct the Price Administrator's previous errors.[6]

The error in this hypothesis is demonstrated by subsequent legislative history. In reporting the bill which became the Stabilization Extension Act of 1944, extending the Emergency Price Control Act, the Senate Committee on Banking and Currency included the so-called Bankhead Amendment, which specifically provided that maximum prices for textile products processed wholly or in substantial part from cotton should include, for each textile item, a reasonable profit. That this was recognized to be a departure from the pricing standards in the Act appears from the views of the minority of the Senate Committee which had opposed the Amendment.[7]

[6] If speculation must be resorted to, a reason for the McKellar Amendment may be found which is in accordance, instead of being in direct conflict, with every other indication of the legislative intention. Congress may well have feared that the new and extensive provisions in the Stabilization Act relating to agricultural commodities, and commodities processed from them, would be construed as entirely superseding the standards of the original act insofar as such commodities were concerned.

Even at the time of the hearings on the Stabilization Extension Act, Senators Taft and Danaher expressed some doubt as to the effect of the Stabilization Act upon the standards in Section 2 (a) of the Emergency Price Control Act. Senate Committee on Banking and Currency, Hearings on S. 1764, 78th Cong., 2d Sess., pp. 1159, 1163–1170. There appears at pp. 1422 *et seq.* a memorandum submitted by the Price Administrator setting forth his views on the relationship between the two Acts.

[7] Sen. Report No. 922, 78th Cong., 2d Sess., pp. 24, 25.

If the McKellar Amendment had established for commodities processed from agricultural commodities a different pricing standard from that established by section 2 (a) of the Emergency Price Control Act, the controversy over the Bankhead Amendment, which was finally adopted in modified form, would have been unnecessary.

We submit, therefore, that the court below was plainly right in holding that the McKellar Amendment did not establish standards for maximum prices for agricultural commodities or their products different from the standards established by section 2 (a) for commodities generally.

3. The next question is whether the court below made an unwarranted departure from the established standards for determining the general fairness and equity of maximum prices by applying the product standard to cattle operations as a whole, instead of applying it to beef operations as measured by the cut-out test method of determining beef costs. This question is essentially bound up with the nature of the meat packing industry. It is necessary therefore to review briefly a few of the outstanding characteristics of the industry. One outstanding fact is that livestock slaughter is heavily concentrated

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in the small minority of large packing companies.[8] Just as the greater part of cattle slaughter is concentrated in the very small minority of packers, so the greater part of cattle slaughter is carried on, not as an isolated activity, but in the closest relationship with many other slaughtering and processing activities (R. 289–291). Fresh beef cuts constitute one of the most important products of the industry, but there is a vast number of processed products in which beef and other materials derived from the slaughter of cattle are used. Beef itself is not only sold fresh by packers for retail distribution, but is dried and cured, fabricated into special cuts suitable for hotels and restaurants, ground into hamburger, and ground or chopped for use in sausage. Moreover, the dressed beef carcass constitutes only about two-thirds of the usable weight of cattle (R. 289, 311–312). For the most part, the remaining materials derived from cattle do not reach the consumer in an unprocessed state, but enter as raw materials into many items manufactured by the meat packing industry such as sausage and canned meat, casings for sausage,

[8] A profit study of the industry made by the Office of Price Administration disclosed that 53 meat packing companies had combined sales in 1939 equal to 85% of the total sales value of all meat and by-products produced in that year. Nine companies, with individual sales of $50,000,000 or more, accounted for over 70% of the total (R. 317, note). Cattle slaughter reflects the high degree of concentration which characterizes the industry generally. The four largest packers alone account for about 50% of the nation's total wholesale slaughter of cattle, and for about 60% of the federally inspected slaughter (R. 367).

glue, fertilizer, and stock and poultry feed (R. 290). Petitioner's processing operations run the full gamut (R. 122–123).

It was in the light of these undisputed facts about the meat packing industry that the Administrator rejected the cut-out test as a measure of beef costs for the industry. The Administrator described the cut-out test as follows in his opinion dated June 21, 1944, which accompanied the order denying petitioner's protest (R. 135):

> The starting point in the test is the price of the steer. This is divided by the percentage yield, the average percentage of the dressed weight of carcasses of that grade to the live weight of the cattle. This would represent the cost of the carcass on a dressed weight basis; i. e., the cost of the carcass if the entire cost of the live animal were allocated to the carcass. Thus, if the cost of a thousand-pound steer were $15.00 per cwt., and it yielded 580 pounds of dressed carcass, a yield of 58%, the cost of the dressed carcass would be $15+0.58, or $25.86 per cwt. To this quotient there is added the expense of producing the carcass. From this total cost, there is deducted a credit for byproducts; that is, those materials derived from the steer which are not a part of the dressed carcass. The amount of the credit is customarily determined by reference to the market value, or, since price control, the ceiling prices of the various byproducts in unprocessed form, without regard to the fact of whether or not the slaughterer sells them or himself processes

> them or uses them as raw materials for other products. The difference between the result of this calculation and the ceiling price for the carcass is the cut-out loss or gain.

The Price Administrator's criticism of the cut-out test [9] was stated as follows in his opinion of June 21, 1944 (R. 135–136):

> The Administrator concluded in the opinion of October 27, 1943, that a loss so calculated was merely a bookkeeping loss. The reasons for this conclusion are evident. In actual operations, a packer buys a lot of steers, breaks them up, processes the parts in a variety of ways, and finally sells them. His "costs" are the sum of the price paid for the steers and the money expended for labor, materials, and overhead in processing and selling the products. Comparing that sum with the total proceeds derived from the sale of all the products obtained from the steers shows

[9] Petitioner charges the Administrator with inconsistency in using the cut-out test as a guide in recommending measures of relief for the non-processing slaughterers. It is self-evident, however, that the test is far more significant as applied to the operations of a cattle slaughterer whose total realization is derived from the sale of beef and cattle by-products in unprocessed form than as applied to the operations of a typical packer. The Emergency Court of Appeals in *Heinz et al.* v. *Bowles*, decided March 29, 1945, set aside the Regulation as applied to non-processing slaughterers on the ground that inadequate provision had been made for this special group in the industry. The judgment setting the Regulation aside was vacated, with the agreement of counsel for the complainants, for the purpose of securing further evidence as to the actual operating experience of the non-processing slaughterers under the Regulation and the special subsidy which they receive.

whether the packer made a profit or suffered a loss. The cut-out test does not give a comparable result. In the first place, the entire cost of the live animal is thrown onto the dressed carcass. No part of that cost is allocated to the material which represents the remaining third of the animal. While a so-called "credit" is given for byproducts, that does not even purport to represent the *cost* of those byproducts. Under these circumstances, the results cannot be said to represent the actual cost of the carcasses. Moreover, the amount of the credit is determined by reference to the market value or ceiling price of the unprocessed byproducts, whereas it is the most important characteristic of the packing industry that it does not in general sell those byproducts, but processes them extensively before sale. Hence neither the market prices for byproducts in unprocessed form, nor ceiling prices based on those market values, can be said to reflect either the cost of the unprocessed byproducts or their value to packers. Moreover, since packers generally further process the byproducts, any value assigned to them for purposes of transfer to the processing departments is essentially a matter of internal bookkeeping and nothing more.

The Administrator found that his doubts as to the adequacy of the cut-out test to measure truly the results of beef operations were reenforced from other sources. In addition to the admissions of authorities on meat packing accounting that the method was inherently "somewhat arbitrary" and showed only

"apparent cost" (R. 136, 137), he pointed to the Federal Trade Commission Report on the Meat Packing Industry, made some years before (R. 137–138), which concluded that "The departmental account accordingly shows a bookkeeping rather than an actual final result." (R. 452).

But the Administrator found even more striking confirmation of his doubts about the reliability of the cut-out test as a measure of fresh beef operations. Applying it to cattle and beef prices which prevailed at Chicago in the years before price control, he discovered that there had been an almost unbroken history of loss since 1937 (R. 245–251). Petitioner did not challenge the Administrator's finding, based on this evidence, that the industry generally sustained a "loss" on fresh beef operations, when measured by the cut-out test, before price control. Indeed, this conclusion was confirmed by the fact that petitioner's own beef department, which included some returns not included in the simple cut-out test,[10] showed increasing losses in the years 1938 through 1941, years of increasing over-all profits and of increasing profits from all processing operations. This history, prior to price control, of almost continuous and increasing losses on beef operations, measured by the cut-out test, during a period of increasing profitability for the meat packing industry, suggested that

[10] Even petitioner does not use the cut-out test in its simplest form to measure the results of its own beef department operations. For example, the cut-out test assumes that all beef is sold in the form of carcasses at the carcass ceiling price. The beef department, however, reflects, at least in part, whatever additional profit may be derived from curing and drying beef (R. 124–125, note). It apparently also reflects any profit derived from fabricating beef cuts for sale to purveyors of meals, and grinding into hamburger (*id.*). Basically, however, the beef department

this test could not properly be accepted as a reliable measure of costs for the purposes of price control.[11]

The issue here, however phrased by petitioner, is essentially one of factual determination, a task peculiarly within the competence of the Administrator, subject to judicial review by the Emergency Court of Appeals as to the reasonableness of his determination. Cf. *Dobson* v. *Commissioner*, 320 U. S. 489. When the foregoing facts are considered, it is evident that petitioner's argument falls far short of showing that the court below was wrong in its conclusion on this phase of the case (R. 454):

> On the whole, we cannot say that the Administrator was without rational support in his conclusion that the cut-out test method of cost accounting is not an acceptable yardstick for determining whether the Regulation establishes generally fair and equitable maximum prices.

If the Administrator was warranted in rejecting the cut-out test as a measure of beef costs—and we

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results, like the cut-out test, are based upon the assumption that all products derived from the slaughter of cattle are sold in unprocessed form at the market or ceiling price, even though they are used for further processing.

[11] The sharp increase in beef department losses since price control, to which petitioner refers, has been accompanied by even sharper increases in processing profits and in over-all profits (R. 147). This phenomenon of increasing losses accompanied by increasing profits from related operations is not self-contradictory, as it may at first appear. The increasing profitability of processing operations increases the value of cattle and thus tends, in a period of great demand, to increase their cost to the packer. By the cut-out test, that cost is thrown entirely on fresh beef operations, thus increasing the "loss" shown by that method of accounting.

submit that he clearly was—it follows that the secondary product standard could not practicably be applied to beef operations alone. There remained the possibility of treating together the closely related group of products which use material derived from the slaughter of cattle. This possibility was adopted by the court below, rejecting the Administrator's contention that only over-all earnings should be considered.

It is still necessary to consider petitioner's argument that certain provisions of the statute remove the question of the acceptability of the cut-out test from the realm of administrative judgment and require the Price Administrator to accept it as the method of determining beef costs, no matter how inappropriate or unreasonable it may be for the purposes of price control.

4. Petitioner contends that Section 2(h) of the Act, and a new provision added to Section 2 (a) by the Stabilization Extension Act of 1944, left the Administrator no choice but to accept the cut-out test as the final measure of beef costs in establishing and maintaining maximum prices. Section 2 (h) provides:

> The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, or changes in established rental practices, except where such action is affirmatively found by the Administrator to be necessary to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act.

The new proviso to Section 2 (a) reads as follows:

> *Provided*, That no such regulation or order shall contain any provision requiring the determination of costs otherwise than in accordance with established accounting methods.

Here again petitioner's argument has to be made in conflict with the language of the statute. This proceeding did not involve any provision of a regulation "requiring" the determination of costs in any particular way. The question was simply what factors the Administrator was required to consider, and how much weight he was required to give them, in determining whether it was incumbent upon him to adjust maximum prices. Once again, any doubt that might conceivably be wrung from the language of the Act is set at rest by the legislative history. Senator Wagner, as chairman of the Senate conferees, made the following statement in presenting the conference bill to the Senate:

> This amendment was agreed to because, while imposing a salutary limitation on the Administrator's discretion by denying him the authority to prescribe the use of accounting methods conflicting with those methods generally established in the accounting profession, the provision does not restrict the Administrator's discretion in establishing maximum prices or in prescribing the factors to be used in calculating maximum prices. (90 Cong. Rec. 6366.)

Section 2 (h) is equally irrelevant, and for substantially the same reasons. The regulation here under

attack does not "compel changes in the cost practices or methods" of the meat packing industry.

As a matter of fact, the determination of the results of cattle operations as a whole, under the standard adopted by the court below, does not even indirectly tend to accomplish a change in petitioner's regular accounting methods. As shown by the additional evidence submitted by petitioner, all that is necessary is a further calculation from data which underlie petitioner's regular accounts. Petitioner, like integrated packers generally, keeps profit and loss records on a departmental basis. To maintain those records for the processing departments, it is necessary to assign a value to the raw materials transferred from the slaughtering departments. Those values provide a basis for allocating the profits of the processing departments back to the several slaughtering departments. Petitioner explained this method, when it submitted additional evidence to the Administrator, in the following terms (R. 116):

> In an integrated packing plant doing extensive processing of byproducts, the results obtained on the byproducts from the slaughter of cattle are not inextricably mingled with the results obtained on the byproducts from the slaughter of other animals. The very fact that byproducts are charged to byproduct processing departments on the basis of current market values makes it possible to make an equitable allocation of the results of a byproduct department which does joint processing of materials from more than one class of animal and of nonanimal materials. Such

an equitable allocation is applied and explained in Exhibit I.

It seems beyond dispute, therefore, that no actual change in petitioner's accounting methods is "required" or "compelled" by the decision below.

5. There remains for consideration petitioner's claim that it, and the greater part of the packing industry, were unlawfully discriminated against because they did not share a special 80-cent subsidy given to non-processing slaughterers. The Administrator had found that there was a special group of slaughterers, accounting for about 15% of the nation's wholesale cattle slaughter (R. 359), who were differentiated from the rest of the industry in that they performed no processing operations whatsoever. Their entire business was confined to the slaughter of cattle and the sale of fresh beef and cattle by-products in unprocessed form. This group, therefore, obtained none of the returns from the processing of beef and by-products enjoyed by the industry generally. Although there was some indication that these non-processors had, under normal conditions, obtained prices higher than the general market, the Administrator concluded that he could not authorize a higher selling price for them; to do so would have destroyed the structure of dollars-and-cents prices for meat which he had found to be essential for effective price control (R. 304). He therefore recommended to the Director of the Office of Economic Stabilization that a special subsidy be provided for non-processors which would make it possible for them

to continue in business. The recommendation was adopted by the Director and included in a plan for the general stabilization of cattle prices announced in a directive issued on October 25, 1943 (8 F. R. 14641).

It is this action which gives rise to the claim of unlawful discrimination. The claim must be judged in the light of the unchallenged evidence in the record that the over-all earnings of the meat packing industry under price control were far in excess of peacetime earnings. Petitioner's argument might suggest that its own extraordinary prosperity was due entirely to operations wholly unconnected with cattle slaughter, or, indeed, with any meat operations. But even excluding from petitioner's over-all earnings the results of all departments not using raw materials derived from cattle slaughter, the remaining earnings were far above peacetime earnings from comparable operations (R. 146). Moreover, the record is perfectly clear that this prosperity was not only shared fully by the other large packers, who, as already noted, together account for the greater part of cattle slaughter, but also by the medium sized and small packers (R. 326, 157, 158). Petitioner's own results also indicated clearly that the product standard was satisfied; that is, that out-of-pocket costs were returned on cattle operations. As the court below noted, these operations in 1943 fell short by only $269,000 of covering the total costs of the related operations, and provided a margin of $8,259,000 above total production or manufacturing costs (R. 458).

For the industry as a whole, therefore, and particularly for petitioner and the other large packers, the Regulation was "generally fair and equitable" as measured by standards developed by the Price Administrator and approved by the Congress. The Administrator believed, however, that he should attempt to secure some relief for the special group of non-processing slaughterers.[12] Section 2 (c) of the Act authorizes the Administrator to establish "such classifications and differentiations * * * as in the judgment of the Administrator, are necessary or proper in order to effectuate the purposes of this Act." Assuming that the Regulation was generally fair and equitable for the industry as a whole, there can be no reasonable doubt that this section authorized the Administrator to make appropriate provision for a class in the industry which would otherwise have been faced with the real possibility of destruction of their business.

Petitioner urges, as one of the reasons for granting the writ (Pet., p. 11), that this action violates the Constitution in several respects. The constitutional limitations regarding taxation (Article I, Sections 2 and 7, and the Sixteenth Amendment) to which petitioner refers are, we submit, clearly irrelevant. It is also urged that there has been arbitrary discrimination and a denial of equal protection of the

[12] The Emergency Court of Appeals, in a related case involving the same Regulation, held that the Administrator was legally obligated to protect this special group of sellers. *Heinz et al.* v. *Bowles*, *supra*, note 9, p. 18.

laws in contravention of the Fifth Amendment. We submit that the foregoing facts plainly show the existence of a reasonable basis for the classification which has been established. Nothing more is required by the Fifth Amendment. Cf. *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U. S. 251; *Currin* v. *Wallace*, 306 U. S. 1.

CONCLUSION

The decision below is correct and does not warrant further review. The petition should therefore be denied.

Respectfully submitted.

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